

§36C-1-103  
Supplemental North Carolina Comment (2021)

Effective July 8, 2021 in paragraph (20) the definition of “terms of a trust” is modified to take into account the changes in the settlor’s original intent by a nonjudicial settlement, a nonjudicial modification with the consent of the settlor and the beneficiaries and a trustee or other person in accordance with law, including a power holder under Article 8A or trustee under Article 8B of this Chapter.

Also effective July 8, 2021 in paragraph (21) the definition of “trust instrument” is modified to provide that it is an instrument that contains the terms of a trust as defined in paragraph (20) of this section.

§36C-1-105  
Supplemental North Carolina Comment (2021)

Effective July 8, 2021 subdivision (b)(2) is amended to add in sub-subdivision (b)(2)a. that the mandatory duties imposed by subdivision (b)(2) is subject to G.S. 36C-8A-4 regarding the duty and liability of a trustee. This amendment was recommended in the Note to Section 9 of the Uniform Directed Trust Act.

Also effective July 8, 2021 the provision in former subsection (c) of this section to the effect that subdivisions (b)(2) and (b)(6) do not apply to a power holder acting in a nonfiduciary capacity under former G.S. 36C-8A-3(a) was brought forward and added in sub-subdivision (b)(2)b. and in subdivision (b)(6).

§36C-8A  
Supplemental North Carolina Comment (2021)

The provisions of Article 8A were reviewed by the drafters in light of the subsequently approved Uniform Directed Trust Act. The drafters considered two options. First, the Uniform Directed Trust Act could be adopted with modifications to retain provisions in the current Article 8A that the drafters thought appropriate. Secondly, the drafters could retain Article 8A but incorporate or follow the provisions in the Uniform Directed Trust Act that were preferred in place of those in the current Article 8A. The drafters chose the second option.

The North Carolina Comments to specific sections of Article 8A describe the amendments made in following or incorporating the provisions of the Uniform Directed Trust Act. As an aid to the practitioner, the North Carolina Comments on the specific sections contain excerpts from the Uniform Directed Trust Act's Official Comments on the provisions that were followed or incorporated.

The North Carolina Comment above should be read keeping in mind the amendments to Article 8A which are briefly summarized as follows:

- (i) G.S. 36C-8A-1(a) adds three exclusions from the definition of “power holder”.
  - (1) The donee of a power of appointment.
  - (2) A person who has authority to consent to the exercise of a power of appointment.
  - (3) A beneficiary with a power over a trust to the extent described in G.S. 36C-8A-(a)(2)(d).
- (ii) Under G.S. 36C-8A-2(a) a power holder may exercise further powers appropriate to the exercise or nonexercise of powers granted by the terms of the trust instrument.
- (iii) Under G.S. 36C-8A-3 the same fiduciary duties and liabilities are imposed on a power holder that would apply to a trustee in a like position and under similar circumstances.
- (iv) Under G.S. 36C-8A-3(e) and 4(d) the power holder and trustee do not have a duty to monitor each other or give advice to or inform others.
- (v) Under G.S. 36C-8A-3(d) and 4(e) the power holder and trustee have a duty to provide information to each other.
- (vi) Under G.S. 36C-8A-3(f) the terms of the trust may provide that the power holder is a nonfiduciary. The power to appoint and remove a trustee is deemed to be a nonfiduciary power unless the instrument provides otherwise.
- (vii) Under G.S. 36C-8A-4.1 and 4.2, the statute of limitations and defenses in action against a trustee apply to a power holder that are applicable to a trustee in a like position and under similar circumstances.

(viii) Under G.S. 36C-8A-8 and 12 provisions are added governing the vacancy in the office of the power holder and giving bond to secure performance of the power holder.

§36C-8A-1  
North Carolina Comment

Effective July 8, 2021 subdivision (a)(1) is amended to add that a person is a power holder as defined in subdivision (a)(1) who is not:

(1) In sub-subdivision (a)(1)(c) a person in which a donor creates a power of appointment.

(2) In sub-subdivision (a)(1)(d) a person who has authority to consent to the exercise of a power of appointment.

(3) In sub-subdivision (a)(1)(e) a beneficiary with the power over a trust to the extent provided in that sub-subdivision.

The provisions of sub-subdivision (a)(1)(c) and e. follow generally the provisions of subsections (a)(1) and (4) of Section 5 of the Uniform Directed Trust Act providing that the Act does not apply to a power of appointment or a beneficiary with the power over a trust to the extent provided in subsection (a)(4). Although the Uniform Directed Trust Act excludes these from the Act, the drafters intended to achieve the same result in providing that a power holder is not a donee of a power of appointment under sub-subdivision (a)(1)(c) or a beneficiary when a power over a trust to the extent described in sub-subdivision (a)(1)(e). Sub-subdivision (a)(1)d. of this section was added based on the recommendation of a commentator on the Uniform Directed Trust Act.

Effective July 8, 2021 subdivision (a)(2) is added to clarify that the power holder may be any one or more of individuals or other persons each of which is qualified to exercise trust powers in this State or a combination of such persons described in subdivision (a)(2). Under G.S. 36C-1-103(12) a “person” includes a legal entity.

Also effective July 8, 2021 subsection (b) was added to clarify that a person is a power holder whether or not the terms of the trust refer to the person as a power holder and, except as otherwise provided in sub-subdivisions (a)(1)b. and e. of this section, whether or not the person is a beneficiary or settlor of the trust.

The Official Comment of the Uniform Directed Trust Act on the exclusion of a power of appointment and the power of a beneficiary over a trust is as follows:

(1) *Power of appointment.* Subsection (b)(1) excludes a “power of appointment,” which is defined by subsection (a) to mean “a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property.” This definition of “power of appointment” is based on the definition in Uniform Powers of Appointment Act § 102(13) (2013). The definition is consistent with what Restatement (Third) of Property: Wills and Other Donative Transfers § 17.1 cmt. g (2011), refers to as a “discretionary” power of appointment, that is, one in which

“the donee may exercise the power arbitrarily as long as the exercise is within the scope of the power.”

Accordingly, if the terms of a trust purport to grant a person not serving as trustee a nonfiduciary power to direct distributions of trust property, under this act that power will be construed as a power of appointment governed by law other than this act, such as the Uniform Powers of Appointment Act (2013) and Restatement (Third) of Property: Wills and Other Donative Transfers §§ 17.1-23.1 (2011).

The exclusion prescribed by subsection (b)(1) applies only to a nonfiduciary power of appointment. It does not apply to a fiduciary power of distribution. Thus, if the terms of a trust grant a person a fiduciary power to direct a distribution of trust property, and the power is exercisable while the person is not serving as trustee, then the power is a power of direction subject to this act.

To resolve doubt about whether a power over distribution is a power of appointment or a power of direction, subsection (c) prescribes a rule of construction under which a power over distribution is a power of appointment, and so is not held in a fiduciary capacity, unless the terms of the trust provide that the power is held in a fiduciary capacity.

A power in a serving trustee to designate a recipient of an ownership interest in or a power of appointment over trust property can never be a power of direction, because a serving trustee can never be a trust director (see Sections 2(5) and (9)). Whether a power over distribution granted to a serving trustee is held in a fiduciary capacity (making it a fiduciary distributive power) or is instead a nonfiduciary power of appointment is governed by law other than this act, such as under Restatement (Third) of Trusts § 50 cmt. a (2003).

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(4) *Power of a beneficiary.* Paragraph (4) excludes a power of a beneficiary to the extent that the exercise or nonexercise of the power affects (A) the beneficial interest of the beneficiary, or (B) the beneficial interest of another beneficiary who is represented by the beneficiary under virtual representation law.

Subparagraph (A) follows from traditional law, under which power that is for the sole benefit of the person holding the power is not a fiduciary power. Restatement (Third) of Trusts § 75 cmt. d (2007). Thus, for example, a power in a beneficiary to release a trustee from a claim by the beneficiary is excluded from this act. To the extent the power affects another person, however, then it is not for the sole benefit of the person holding the power. Hence, a power over a trust held by a beneficiary may be a power of direction subject to this act if it affects the beneficial interest of another beneficiary. For example, a power in a beneficiary to release the trustee from a claim by another beneficiary is not excluded by this paragraph unless the power to bind the other beneficiary arises by reason of virtual representation.

The same rules apply if the beneficiary's power is jointly held. Thus, for example, if the terms of a trust provide that a trustee may be released from liability by a majority of the beneficiaries, and a majority of the beneficiaries grants such a release, then those beneficiaries would be acting as trust directors to the extent the release bound other beneficiaries by reason of the power other than by virtual representation. This act would therefore reverse the result in *Vena v. Vena*, 899 N.E.2d 522 (Ill. App. 2008), in which the court refused to enforce a provision for release of a trustee by a majority of the beneficiaries on the grounds that the minority beneficiaries did not have recourse against the majority for an abusive release. Under this act, the minority beneficiaries would have recourse against the majority for breach of their fiduciary duty as trust directors.

The carve-out for virtual representation in subparagraph (B) reflects the drafting committee's intent not to impose the fiduciary rules of this act on top of the law of virtual representation, which contains its own limits and safeguards. Without the exclusion of this subsection, the definitions contained in paragraphs (5) and (9) of Section 2 could have been read to transform a beneficiary who represented another beneficiary by virtual representation into a trust director.

By way of illustration, under Uniform Trust Code § 304 (2000), a beneficiary who suffers from an incapacitating case of Alzheimer's disease may sometimes be represented by another beneficiary in litigation against a trustee for breach of trust. In such a case, paragraph (4) of this section prevents the beneficiary who represents the beneficiary with Alzheimer's from being a trust director. Instead, the safeguards provided by the law of virtual representation will apply. Under § 304, for example, the representative beneficiary and the beneficiary with Alzheimer's disease must have "a substantially identical interest with respect to the particular question or dispute," and have "no conflict of interest" with each other.

#### §36C-8A-2 North Carolina Comment

Effective July 8, 2021 subparagraph (c) is added to incorporate in substance and make applicable to a power holder the provisions of subsection (b)(1) of Section 6 of the Uniform Directed Trust Act authorizing a trust director to exercise further powers appropriate to the exercise or nonexercise of a power of direction granted to the trust director. The drafters considered this default provision to be a desirable addition to make more comprehensive the powers granted in subsection (a) and (b) by the terms of the trust.

Effective July 8, 2021 subsection (d) is added to bring forward in substance the provisions of former G.S. 36C-8A-3(c)(1).

The Official Comment of the Uniform Directed Trust Act on further powers appropriate to the exercise or nonexercise of a power of direction granted to a trust director is in part as follows:

(1) *Further appropriate powers.* Subsection (b)(1) prescribes a default rule under which a trust director may exercise any "further" power that is "appropriate"

to the director's exercise of the director's express powers granted by the terms of the trust under subsection (a). The term "appropriate" is drawn from Uniform Trust Code § 815(a)(2)(B) (2000). Appropriateness should be judged in relation to the purpose for which the power was granted and the function being carried out by the director. Examples of further powers that might be appropriate include a power to: (1) incur reasonable costs and direct indemnification for those costs; (2) make a report or accounting to a beneficiary or other interested party; (3) direct a trustee to issue a certification of trust under Uniform Trust Code § 1013 (2000); (4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or (5) employ a professional to assist or advise the director in the exercise or nonexercise of the director's powers.

*Delegation by trust director.* In some circumstances, it may be appropriate under subsection (b)(1) for a trust director to exercise a further power to delegate the director's powers, much as it may sometimes be appropriate for a trustee to delegate its powers. Under Section 8, a trust director is subject to the same fiduciary duty regarding delegation as a trustee in a like position and under similar circumstances. In most states, therefore, a trust director would be required to exercise reasonable care, skill, and caution in selecting, instructing, and monitoring an agent, and a director that did so would not be liable for the action of the agent. In accordance with prevailing law governing delegation by a trustee, see, e.g., Uniform Trust Code § 807 (2000); Uniform Prudent Investor Act § 9 (1994); Restatement (Third) of Trusts § 80 (2007), the drafting committee contemplated that in performing a function delegated by a trust director, the agent would owe a duty to exercise reasonable care.

*Trust director's standing to sue.* Subsection (b)(1) addresses the situation that arose in *Schwartz v. Wellin*, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014). The court held that a trust director, which the terms of the trust referred to as a "trust protector," lacked standing to bring a lawsuit under Rule 17(a)(1) of the Federal Rules of Civil Procedure, because the director was neither a real party in interest nor a party that could pursue a claim if not a real party in interest.

In some circumstances, subsection (b)(1) may produce a different outcome. Rule 17(a)(1) allows a party to participate in litigation even if the party is not a real party in interest if the party is "authorized by statute." Subsection (b)(1) supplies the requisite statutory authorization if participating in a lawsuit would be "appropriate" to a director's exercise or nonexercise of a power granted by the terms of the trust under subsection (a). It would normally be "appropriate," for example, for a trust director to bring an action against a directed trustee if the trustee refused to comply with a director's exercise of a power of direction. The requisite statutory authorization might also come from subsection (a) if the terms of the trust expressly confer a power of litigation on a director.

§36C-8A-3  
North Carolina Comment

Effective July 8, 2021 subsection (a) is amended to incorporate, in substance and, except as provided in subsection (e) of this section, make applicable to a power holder the provisions of subsection (a) of Section 8 of the Uniform Directed Trust Act imposing the same fiduciary duty and liability on a trust director that would apply to a trustee in a like position and under similar circumstances. This provision replaces the former provision in subsection (a) regarding the fiduciary duties of the power holder. The drafters thought that the incorporated provisions were a simpler and more comprehensive description of the fiduciary duty and liability of a power holder than the provision in former subsection (a).

Effective July 8, 2021 the provisions of subsection (b) providing that the power holder is liable for losses or for any loss that results from the breach of fiduciary duty is deleted as being absorbed within the provisions regarding the liability of a power holder under subsection (a).

Effective July 8, 2021 subsection (c) is amended to refer to the provisions regarding the same duty and liability of a power holder as a trustee in a like position under similar circumstances in listing specific statutory provisions that this duty and liability include. Sub-subdivision (c)(4) was added to include the provisions of G.S. 36C-7-703 regarding cotrustees.

Effective July 8, 2021, subsection (d) is added to incorporate in substance and make applicable to a power holder the provisions of subsections (b) and (d) of Section 10 of the Uniform Directed Trust Act with respect to the duty of a trust director to provide information to the trustee. In the second sentence the words “intentional misconduct” were substituted for the words “lawful misconduct” appearing in the provision of the Uniform Directed Trust Act. The duty of a trust director to provide information to a trustee has not previously been addressed in Article 8A. This duty is added for the reasons stated in the Official Comments to provide the trustee with sufficient information to fulfill the trustee’s obligation under the trust law as well as other law.

Effective July 8, 2021 subsection (e) is added to incorporate in substance and make applicable to a power holder the provisions of subsection (b) of Section 11 of the Uniform Directed Trust Act that a trust director does not have a duty to monitor a trustee or give advice to others concerning the instances in which the trust director might have acted differently than a trustee. This rule has not been previously addressed in Article 8A although the same rule applied to a trustee under G.S. 36C-8A-4(d).

Effective July 8, 2021 subsection (f) is added to clarify that the terms of the trust may provide that the power holder is a nonfiduciary with respect to the exercise or nonexercise of the powers, but unless the terms of the trust provide otherwise, the power to remove and appoint a trustee or power holder shall be deemed to be held in a nonfiduciary capacity. The provision that the power to remove and appoint a trustee or power holder is deemed to be held in a nonfiduciary capacity is consistent with former subsection (a) of this section providing that the power holder is not a fiduciary with respect to the power to remove and appoint a trustee or power holder.

The Official Comment of the Uniform Directed Trust Act on the duty and liability of the trust director is in part as follows:

*Duty and liability of a trust director.* This section addresses the duty and liability of a trust director. It should be read in conjunction with Section 10, which governs information sharing among directed trustees and trust directors, and Section 11, which eliminates certain duties to monitor, inform, or give advice. The drafting committee contemplated that this section, along with Sections 10 and 11, would prescribe the mandatory minimum fiduciary duties of a trust director, displacing any contrary mandatory minimum such as under Uniform Trust Code § 105 (2005).

*Subsection (a).* Subsection (a) imposes the same fiduciary duties on a trust director that would apply to a trustee in a like position and under similar circumstances. A trust director with a power to make or direct investments, for example, has the same duties that would apply to a trustee with the same power, including a duty to act prudently, in the sole interest of the beneficiaries, and impartially with due regard for the respective interests of the beneficiaries. *See, e.g.,* Restatement (Third) of Trusts §§ 77–79, 90–92 (2007). The theory behind subsection (a) is that if a trust director has a power of direction, the director is the most appropriate person to bear the duty associated with the exercise or nonexercise of that power. Put differently, in a directed trust, a trust director functions much like a trustee in a non-directed trust, and thus should have the same duties as a trustee.

Accordingly, subsection (a)(1) sets the default duties of a trust director by absorbing the default duties that would ordinarily apply to a trustee in a like position and under similar circumstances. Subsection (a)(2) sets the mandatory minimum duties of a trust director by absorbing the mandatory minimum duties that the terms of a trust cannot vary for a trustee in a like position and under similar circumstances. The default and mandatory rules applicable to a trustee include those prescribed by the other provisions of this act.

In making a trust director a fiduciary, subsection (a) follows the great majority of the existing state directed trust statutes. Subsection (a) is more specific than many state statutes, however, as the existing statutes tend to say only that a trust director is a “fiduciary,” without specifying which kind of fiduciary or which fiduciary duties apply. Subsection (a) provides greater clarity by specifically absorbing the fiduciary duty of a similarly situated trustee.

*Absorption of existing trust fiduciary law.* Subsection (a) operates by absorbing existing state law rather than by inventing a new body of law. Absorbing existing state law in this manner offers several advantages. First, it avoids the need to spell out the entirety of trust fiduciary law. That is, it avoids the need to replicate something like Article 8 of the Uniform Trust Code for trust directors. Second, absorbing the trust fiduciary law of each enacting state accommodates diversity across the states in the particulars of a trustee’s default and mandatory fiduciary duties, such as the duties to diversify and to give information to the beneficiaries, both of which have become increasingly differentiated across the states. Third, absorption allows for changes to the law of a trustee’s fiduciary duties to be absorbed automatically into the duties of a trust director without need for periodic conforming revisions to this act.



*Varied circumstances of trust directors.* In applying the law of trustee fiduciary duties to a trust director, a court must make use of the flexibility built into fiduciary law. Courts have long applied the duties of loyalty and prudence across a wide array of circumstances, including many different kinds of trusts as well as other fiduciary relationships, such as corporations and agencies. Fiduciary principles are thus amenable to application in a context-specific manner that is sensitive to the particular circumstances and structure of each directed trust. In assessing the actions of a director that holds a power to modify a trust, for example, a court should apply the standards of loyalty and prudence in a manner that is appropriate to the particular context, including the trust's terms and purposes and the director's particular powers.

*The trust director's duty of disclosure.* Under subsection (a), a trust director is subject to the same duties of disclosure as a trustee in a like position and under similar circumstances. For example, if a trust director intends to direct a nonroutine transaction, to change "investment. . . strategies," or to take "significant actions. . . involving hard-to-value assets or special sensitivity to beneficiaries," the director is under a duty of affirmative advance disclosure, just like a trustee. Restatement (Third) of Trusts § 82 cmt. d (2007). A trust director's disclosure duties are limited, however, by Section 11, which eliminates certain duties to monitor, inform, or give advice.

*Sole versus joint powers.* Under subsection (a), a trust director has the same fiduciary duties as a sole trustee when a power of direction is held individually and the same fiduciary duties as a cotrustee when a power of direction is held jointly. A trust director that individually holds a power to amend the trust, for example, does not have the duties of a cotrustee to monitor the actions of the trustee concerning investments or the actions of another trust director concerning the determination of a beneficiary's capacity.

Subject to Section 11, a trust director that holds a power of direction jointly with a trustee or another trust director, by contrast, has the duties of a cotrustee regarding the actions of that trustee or other trust director that are within the scope of the jointly held power. Thus, a trust director that jointly exercises a power to direct investments with other trust directors has the same fiduciary duties as a cotrustee regarding its own actions and the actions of the other directors with respect to the power.



The Official Comment of the Uniform Directed Trust Act on the duty of a trust director to provide information to the trustee is as follows:

*Subsections (a) and (b)—Duty to provide information.* This section imposes duties on trustees and trust directors to provide information to each other. Subsection (a) imposes this duty on a directed trustee, and subsection (b) imposes this duty on a trust director. The drafting committee contemplated that the duties created by this

section would provide trustees and trust directors with sufficient information to fulfill their obligations under trust law as well as other law, including banking, securities, and tax law.

*Disclosure to beneficiaries.* This section governs disclosure of information to trustees and trust directors. The duty of a trust director to disclose information to a beneficiary is governed by Section 8, which prescribes the fiduciary duties of a trust director, subject to Section 11. The duty of a trustee to disclose information to a beneficiary is governed by the background law of an enacting state under Section 4 as modified by Section 11, which limits a directed trustee's duty to inform a beneficiary about the actions of a trust director.

*Reasonableness.* This section relies heavily on the concept of reasonableness. Information must be disclosed only if it is reasonably related both to the powers or duties of the person making the disclosure and to the powers or duties of the person receiving the disclosure. The information must be reasonably related to the powers or duties of the person making the disclosure, because otherwise that person cannot be expected to possess the information. The information must also be reasonably related to the powers or duties of the person receiving the disclosure, because otherwise that person would not need the information. Examples of matters that might require disclosure under this section include asset valuations, modifications to the terms of a trust, changes to investment policy or strategy, distributions, changes in accounting procedure or valuations, and removal or appointment of trustees and trust directors.

*Both an affirmative and a responsive duty to inform.* This section imposes an affirmative duty to provide information (even in the absence of a request for that information) as well as a responsive duty to reply to requests for information. For example, if a trust director exercises a power to modify the terms of a trust, the director would have an affirmative duty to inform the trustees and other trust directors whose powers or duties are reasonably related to the amendment whether or not the trustees or other trust directors inquired about it. Similarly, the director would have a responsive duty to provide information about the amendment upon a request by a trustee or another trust director whose powers or duties were reasonably related to the amendment.

*Interaction with Section 11.* The duties of a trustee (in subsection (a)) and of a trust director (in subsection (b)) to disclose information are subject to the limitations of Section 11. Thus, although a trustee has a duty under this section to disclose information that is related to both the powers or duties of the trustee and the powers or duties of the director, a trustee does not have a duty to inform or give advice to the trust director concerning instances in which the trustee would have exercised the director's powers differently. The same is true for a trust director.

*Shelton v. Tamposi.* In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), the terms of the trust left distribution in the hands of the trustee, but shifted power over investment to a trust director (the "investment director"). As a result, the trustee

could not liquidate investments to raise the cash necessary to fund a distribution to one of the beneficiaries. Under subsection (b), the trust director would have been under a duty to give the trustee information about the effects of the director's investment program on the trust's cash position, and the trustee would have been under a duty to give the director information about the cash requirements of the trustee's distribution program. Moreover, in making and implementing the investment program, under Section 8(a) the trust director would be subject to the same duties as a similarly situated trustee, just as the trustee would be subject to the duties of a trustee in making and implementing the distribution program.

*Subsections (c) and (d)*—Subsection (c) provides a safe harbor for a trustee that acts in reliance on information provided by a trust director. Subsection (d) provides a similar safe harbor for a trust director for information provided by a trustee or other trust director. Under both subsections, the safe harbor only applies if the trustee or trust director that acts in reliance on the information is not engaged in willful misconduct. For example, subsection (c) protects a trustee if the trustee acts in reliance on a trust director's valuation of an asset, unless by accepting the valuation the trustee would engage in willful misconduct. As in Section 9, the rationale for the safe harbor and willful misconduct limit is to implement the settlor's division of labor subject to a mandatory fiduciary minimum.

*No ceiling on duties to share information.* This section imposes a mandatory floor, rather than a ceiling, on a directed trustee's and a trust director's duty to share information. The terms of a trust may specify more extensive duties of information sharing among directed trustees and trust directors.

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The Official Comment of the Uniform Directed Trust Act on the duty of a trust director to monitor, inform or advise is as follows:

The existing statutes on which this section is based were meant to reverse the result in *Rollins v. Branch Banking & Trust Company of Virginia*, 56 Va. Cir. 147 (2002), in which the court considered the liability of a trustee that was subject to direction in investment. The court declined to hold the trustee liable for the investment director's failure to direct diversification of the trust's investments, but the court nevertheless held the trustee liable for failing to advise the beneficiaries about the risks of the investment director's actions.

*Survival of trustee's and trust director's general duty of disclosure.* Although this section confirms that a directed trustee has no duty to monitor a trust director or inform or give advice to others concerning instances in which the trustee might have acted differently than the director, this section does not relieve a trustee of its ordinary duties to disclose, report, or account under otherwise applicable law such as under Uniform Trust Code § 813 (2004) or Restatement (Third) of Trusts § 82 (2007). The same is true for a trust director, on whom Section 8(a) imposes the fiduciary duties of a trustee.

For example, if a trust director has a power to direct investments, this section would relieve a directed trustee of any duty to advise a beneficiary about the risks of the director's decision to concentrate the investment portfolio. The trustee would remain under a duty, however, to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust to the extent required by otherwise applicable law. The trustee would also remain under the duty imposed by Section 10 to provide a trust director with information reasonably related to its powers and duties.

*No assumption of duty.* In addition to waiving a directed trustee's duty to monitor, inform, or give advice as under subsection (a)(1), many state statutes go further and also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these activities will be deemed to be "administrative actions." *See, e.g.*, Del. Code Ann. tit. 12, § 3313(e) (2017). The purpose of these provisions is to ensure that if a directed trustee chooses for some reason to monitor, inform, or give advice, the trustee does not assume a continuing obligation to do so or concede a prior duty to have done so. This section dispenses with the opacity of an administrative classification and achieves the intended result more directly. Subsection (a)(2) provides that if a trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not thereby assume a duty to do so. Subsection (b)(2) applies the same rule for a trust director.

§36C-8A-4  
North Carolina Comment

Effective July 8, 2021 subsection (d) is amended to incorporate in substance the provisions of subsection (a) of Section 11 of the Uniform Directed Trust Act that a trustee does not have a duty to monitor a trust director or give advice to others concerning instances in which the trustee might have acted differently than the trust director. The substitution of this provision is in place of former subsection (a), the drafters agreed with the Official Comments that the language of the provision of subsection (a) of Section 11 of the Uniform Directed Trust Act was simpler and more direct. A similar rule applicable to a power holder was added in G.S. 36C-8A-3(e).

Effective July 8, 2021 subsection (e) is added to incorporate the provisions of subsections (a) and (c) of Section 10 of the Uniform Directed Trust Act with respect to the duty of a trustee to provide information to a trust director. This duty, which is new to Article 8A, is added for the reason stated in the Official Comment to provide a trust director with sufficient information to fulfill the trust director's obligation under trust law as well as other law.

The Official Comment of the Uniform Directed Trust Act on the duty of a trustee to monitor, inform, or advise is as follows:

*Following existing statutes.* Subsection (a) provides that a trustee does not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning instances in which the trustee might have acted differently than the director. Many existing state statutes are to similar effect, though the language in this section is simpler and more direct. Subsection (b)

applies the same rule to a trust director regarding the actions of a trustee or another trust director.

The existing statutes on which this section is based were meant to reverse the result in *Rollins v. Branch Banking & Trust Company of Virginia*, 56 Va. Cir. 147 (2002), in which the court considered the liability of a trustee that was subject to direction in investment. The court declined to hold the trustee liable for the investment director's failure to direct diversification of the trust's investments, but the court nevertheless held the trustee liable for failing to advise the beneficiaries about the risks of the investment director's actions.

*Survival of trustee's and trust director's general duty of disclosure.* Although this section confirms that a directed trustee has no duty to monitor a trust director or inform or give advice to others concerning instances in which the trustee might have acted differently than the director, this section does not relieve a trustee of its ordinary duties to disclose, report, or account under otherwise applicable law such as under Uniform Trust Code § 813 (2004) or Restatement (Third) of Trusts § 82 (2007). The same is true for a trust director, on whom Section 8(a) imposes the fiduciary duties of a trustee.

For example, if a trust director has a power to direct investments, this section would relieve a directed trustee of any duty to advise a beneficiary about the risks of the director's decision to concentrate the investment portfolio. The trustee would remain under a duty, however, to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust to the extent required by otherwise applicable law. The trustee would also remain under the duty imposed by Section 10 provide a trust director with information reasonably related to its powers and duties.

*No assumption of duty.* In addition to waiving a directed trustee's duty to monitor, inform, or give advice as under subsection (a)(1), many state statutes go further and also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these activities will be deemed to be "administrative actions." *See, e.g.,* Del. Code Ann. tit. 12, § 3313(e) (2017). The purpose of these provisions is to ensure that if a directed trustee chooses for some reason to monitor, inform, or give advice, the trustee does not assume a continuing obligation to do so or concede a prior duty to have done so. This section dispenses with the opacity of an administrative classification and achieves the intended result more directly. Subsection (a)(2) provides that if a trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not thereby assume a duty to do so. Subsection (b)(2) applies the same rule for a trust director.

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The Official Comment of the Uniform Directed Trust Act on the duty of a trustee to provide information to the trust director is as follows:

*Subsections (a) and (b)—Duty to provide information.* This section imposes duties on trustees and trust directors to provide information to each other. Subsection (a) imposes this duty on a directed trustee, and subsection (b) imposes this duty on a trust director. The drafting committee contemplated that the duties created by this section would provide trustees and trust directors with sufficient information to fulfill their obligations under trust law as well as other law, including banking, securities, and tax law.

*Disclosure to beneficiaries.* This section governs disclosure of information to trustees and trust directors. The duty of a trust director to disclose information to a beneficiary is governed by Section 8, which prescribes the fiduciary duties of a trust director, subject to Section 11. The duty of a trustee to disclose information to a beneficiary is governed by the background law of an enacting state under Section 4 as modified by Section 11, which limits a directed trustee's duty to inform a beneficiary about the actions of a trust director.

*Reasonableness.* This section relies heavily on the concept of reasonableness. Information must be disclosed only if it is reasonably related both to the powers or duties of the person making the disclosure and to the powers or duties of the person receiving the disclosure. The information must be reasonably related to the powers or duties of the person making the disclosure, because otherwise that person cannot be expected to possess the information. The information must also be reasonably related to the powers or duties of the person receiving the disclosure, because otherwise that person would not need the information. Examples of matters that might require disclosure under this section include asset valuations, modifications to the terms of a trust, changes to investment policy or strategy, distributions, changes in accounting procedure or valuations, and removal or appointment of trustees and trust directors.

*Both an affirmative and a responsive duty to inform.* This section imposes an affirmative duty to provide information (even in the absence of a request for that information) as well as a responsive duty to reply to requests for information. For example, if a trust director exercises a power to modify the terms of a trust, the director would have an affirmative duty to inform the trustees and other trust directors whose powers or duties are reasonably related to the amendment whether or not the trustees or other trust directors inquired about it. Similarly, the director would have a responsive duty to provide information about the amendment upon a request by a trustee or another trust director whose powers or duties were reasonably related to the amendment.

*Interaction with Section 11.* The duties of a trustee (in subsection (a)) and of a trust director (in subsection (b)) to disclose information are subject to the limitations of Section 11. Thus, although a trustee has a duty under this section to disclose information that is related to both the powers or duties of the trustee and the powers or duties of the director, a trustee does not have a duty to inform or give advice to the trust director concerning instances in which the trustee would have exercised the director's powers differently. The same is true for a trust director.

*Shelton v. Tamposi.* In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), the terms of the trust left distribution in the hands of the trustee, but shifted power over investment to a trust director (the “investment director”). As a result, the trustee could not liquidate investments to raise the cash necessary to fund a distribution to one of the beneficiaries. Under subsection (b), the trust director would have been under a duty to give the trustee information about the effects of the director’s investment program on the trust’s cash position, and the trustee would have been under a duty to give the director information about the cash requirements of the trustee’s distribution program. Moreover, in making and implementing the investment program, under Section 8(a) the trust director would be subject to the same duties as a similarly situated trustee, just as the trustee would be subject to the duties of a trustee in making and implementing the distribution program.

*Subsections (c) and (d)*—Subsection (c) provides a safe harbor for a trustee that acts in reliance on information provided by a trust director. Subsection (d) provides a similar safe harbor for a trust director for information provided by a trustee or other trust director. Under both subsections, the safe harbor only applies if the trustee or trust director that acts in reliance on the information is not engaged in willful misconduct. For example, subsection (c) protects a trustee if the trustee acts in reliance on a trust director’s valuation of an asset, unless by accepting the valuation the trustee would engage in willful misconduct. As in Section 9, the rationale for the safe harbor and willful misconduct limit is to implement the settlor’s division of labor subject to a mandatory fiduciary minimum.

*No ceiling on duties to share information.* This section imposes a mandatory floor, rather than a ceiling, on a directed trustee’s and a trust director’s duty to share information. The terms of a trust may specify more extensive duties of information sharing among directed trustees and trust directors.

#### §36C-8A-4.1 North Carolina Comment

This section is added to incorporate in substance and make applicable to a power holder the provisions of subsection (a) of Section 13 of the Uniform Directed Trust Act applying the statute of limitations applicable to a trust director as it would to a trustee in like position and under similar circumstances. These provisions not previously addressed in Article 8A, are consistent with the general rule in G.S. 36-8A-3(a) making applicable to a power holder the duty and liability that is applicable to a trustee in a like position and under similar circumstances.

The Official Comment of the Uniform Directed Trust Act on the limitation of action against a trust director is in part as follows:

This section absorbs for a trust director the law of an enacting state governing limitations on an action against a trustee. A limitation applies to a trust director as it would to a trustee in a like position and under similar circumstances. Whether the law is default or mandatory as applied to a trust director, for example, is determined by whether it is default or mandatory as applied to a trustee.

Subsection (a) extends to a trust director the same limits on liability that a trustee enjoys under the law of an enacting state by way of a statutory limitations period, such as under Uniform Trust Code § 1005(c) (2000). The limitations period absorbed by subsection (a) applies to all claims against a trust director for breach of trust, whether by a beneficiary, a trustee, another trust director, or some other party.

§36C-8A-4.2  
North Carolina Comment

This section is added to incorporate in substance and make applicable to a power holder the provisions of Section 14 of the Uniform Directed Trust Act providing for defenses in actions against a trust director that are available to a trustee in a like position and under similar circumstances. The addition of this provision, which is new to Article 8A, is consistent with the general rule in G.S. 36C-8A-3(a) making applicable to a power holder the duty and liability that applies to a trustee in a like position and under similar circumstances.

The Official Comment of the Uniform Directed Trust Act on the defenses in action against a trust director is in part as follows:

*Absorption.* This section makes available to a trust director the same defenses that are available to a trustee in a like position and under similar circumstances in an action for breach of trust. A trust director can assert any defense that would be available to a trustee in a comparable action for breach of trust under existing state law, including:

- laches or estoppel (see Restatement (Third) of Trusts § 98 (2012));
- consent, release, or ratification by a beneficiary (see Uniform Trust Code § 100901); Restatement (Third) of Trusts § 97(b) – (c) (2012));
- reasonable reliance on the terms of a trust (see Uniform Trust Code § 1006 (2000); Uniform Prudent Investor Act § 1(b) (1994)); and
- reasonable care in ascertaining the happening of an event affecting administration or distribution (see Uniform Trust Code § 1007 (2000); Restatement (Third) of Trusts § 76 cmt. f (2007)).

§36C-8A-8  
North Carolina Comment

This section makes additional rules regarding the vacancy in the office of a trustee under G.S. 36C-7-704 applicable to a power holder. Specifically:

- (1) Subdivision (a)(1) tracks the provisions of G.S. 36C-7-704(b);
- (2) Subdivision (a)(2) follows the provisions of G.S. 36C-7-704(c)(1);
- (3) Subdivision (a)(4) follows the provisions of G.S. 36C-7-704(e); and
- (4) Subsection (b) follows the provisions of G.S. 36C-7-704(f).



Making additional rules applicable to the vacancy in the office of the trustee applicable to a power holder is consistent with the objective, as reflected in other sections of this Article 8A, to make administrative provisions regarding the office of a trustee under the North Carolina Uniform Trust Code applicable to a power holder.

§36C-8A-12  
North Carolina Comment (2021)

This section is added to make provisions of G.S. 36C-7-702 regarding the giving of bond to secure the performance of the trustee applicable to a power holder except that in subsection (a) a bond is required only if the terms of the trust require a power holder to provide a bond, whereas in G.S. 36C-7-702(a) a bond of a trustee is not required if the governing instrument directs otherwise.

Making the provisions regarding the giving of a bond applicable to a power holder is new to Article 8A. The addition of the provisions is consistent with the objective, as reflected in other sections of Article 8A, to make administrative provisions regarding the office of a trustee under the North Carolina Uniform Trust Code applicable to a power holder.